The European Parliament and the Fiscal Compact

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The debate on the Fiscal Compact focuses mainly on the question whether it is in accordance with the German Constitution. So far, however, the debate lacks a European dimension. This is all the more surprising since the Fiscal Compact calls into question fundamental European ideas of social justice and democracy.

The Compact permanently establishes a politics of austerity. It delimits democratic control over fiscal policies and undermines social rights. These changes conflict on many levels with the foundations of a social democracy shaped by the European Treaties as well as the European Charter of Fundamental Rights.

A one-sided debate focusing on national constitutional matters alone bears the risk that it will be framed as a battle of competences between Member States and the EU. Instead, we propose that the discussion should highlight the social and democratic foundations of the EU itself. The task is thus not to defend social and democratic values under the auspices of national sovereignty *against* the Union. Rather, they must be defended *in* Europe against an invasive and rapidly expanding policy of austerity.

While the German Constitutional Court could very well have addressed the issues of defending social and democratic values in the European Union, it decided not to do so. Instead it went on to define more and more spheres of public competences which are principally not transferable to the European level. It would, however, be more appropriate for the Court to see itself as the guardian of parliamentary control. Its role would then be to ensure that as long as there is no functional equivalent to parliamentary control of fiscal and social policies on the European level, the national parliaments can and have to exercise this control. It is unlikely, however, that the German Constitutional Court will interpret its role in this way when ruling on the Fiscal Compact. More likely, it will continue to defend the bastion of national competences against the EU by reinforcing its strategy of defining non-transferable areas of national competences.

It is therefore necessary to address the creeping devaluation of democratic participation in Europe within the European institutions. Martin Schulz, the President of the European Parliament, was right when he said that the fight against the European sovereign debt crisis “comes at the expense of parliamentary co-determination.” The fact that the European Parliament was not involved in the drafting of the Fiscal Compact shows that the governments of the member states frequently bypass the Parliament when charting the course of action during the debt crisis.

But why has nobody brought this matter to the European Court of Justice? The reason can be found in weaknesses in the institutional arrangement of checks and balances in the EU. German constitutional law provides for representative action, i.e., in certain cases also a parliamentary minority is given the right to sue for violation of rights of the whole parliament. Thus, by way of representative action, a parliamentary minority can enforce parliamentary rights vis-à-vis other bodies of government. Unfortunately, this option does not exist in the European context.

However, an action of the European Parliament before the ECJ is much needed to restore its reputation. What is at stake is nothing less than the notion of democratic rule in Europe.. And indeed there are options available to the European Parliament for bringing the question of democratic participation before the European Court of Justice. The TFEU authorizes the Parliament to file an action for annulment as well as an action for failure to act.

Moreover, it is possible to demand the Court’s opinion on the compatibility of an international agreement with the provisions of the TFEU provided for in Art. 218 (11) TFEU. According to this Article, the Parliament can “obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the

Treaty." The EU is not a signatory to the Fiscal Compact. Instead the 25 Member States who signed the Fiscal Compact opted to draft a treaty under public international law.

According to the rules of international law, the Fiscal Compact is a treaty providing for obligations of a third party, i.e. the EU, because it stipulates that the institutions of the EU, namely the European Commission, are entrusted with the execution of the treaty. This assignment of duties to a third party via a treaty requires, under customary international law, the express and written consent of said third party. Art. 35 of the Vienna Convention on the Law of Treaties applies mutatis mutandis.

Such express and written consent needs to meet the requirements of European Law. Art. 216 et seqq. TFEU provide for a detailed procedure for the adoption of international agreements by the Union. According to prevailing case law of the ECJ this procedure also applies to cases where the EU executes a unilateral declaration of intent. Thus, consenting to the Fiscal Compact in the form of a unilateral declaration of intent requires that the procedural standards of Art. 216 et sqq. TFEU are met. Art. 218 TFEU requires, inter alia, consent of the Parliament prior to the conclusion of an international agreement. Without such consent by the European Parliament, the Commission has no contractual duties emanating from the Fiscal Compact. The Commission would therefore not be allowed to execute any of the duties assigned to it in the Fiscal Compact.

The European Parliament is well advised to bring this matter to the ECJ. An application for an opinion provided for in Art. 218 (11) TFEU would give the ECJ the opportunity to assess the scope of the Parliament's rights with respect to the Union's external actions. This is all the more important since recent events point towards a trend of *gubernative* legislation on the European level. The ECJ will have to remind the European stakeholders that parliamentary co-determination is a basic principle of a democratic European Union. But applying for an opinion as per Art. 218 (11) TFEU will also open the door to judicial review of other substantive issues of the Fiscal Compact. There are at least three additional issues at hand:

First, under European Law, the assignment of duties to the Commission requires the consent of all Member States. And only if these internal legal requirements are fulfilled can the Union exercise its external powers.

Second, the sanctions regime of the excessive deficit procedure, as developed in the so-called Six-Pack regulations, contradicts EU primary law. Making national budgets subject to prior approval by the EU will require changes in the European Treaties themselves.

Third, the ECJ has to take into account that Art. 7 of the Fiscal Compact aims at tying the voting decisions of respective Member States in the Council exclusively to matters of fiscal rationality. This is not in line with the institutional arrangements of the EU. The EU is not a one-sided joint venture for the single purpose of establishing a politics of austerity. Matters of macroeconomic balance, constitutional and human rights as well as social policies are just as important in the European context. In this light, Art. 7 of the Fiscal Compact endangers the plurality of goals of the European Union in Council votes by establishing a permanent bias towards austerity.

Thus, the European Parliament, by applying for an opinion as per Art. 218 (11) TFEU, should enable the ECJ to deliver an opinion on the matters at hand.. This way, the EP could effectively counter the tendency of its own marginalization, and hopefully it would also give the ECJ the chance to remind the European stakeholders of the fundamental social and democratic principles of a European governance committed to the ideal of rule of law.

SUGGESTED CITATION Fischer-Lescano, Andreas: *The European Parliament and the Fiscal Compact, VerfBlog,* 2012/7/05, http://verfassungsblog.de/the-european-parliament-and-the-fiscal-compact/.